

20 January 1970

MEMORANDUM FOR THE DIRECTOR

SUBJECT: State Department Legal Concerns Re Laotian Operations

1. There is a small matter brewing in the Sullivan Committee which does not now affect us but which I want to flag to your attention and that of some of our colleagues. One of State's earnest young lawyers, a Mr. Stanley N. Futterman, has been brooding about the Church Amendment to the Military Appropriations Act and has written the attached memorandum in which he advances the thesis that the Church Amendment imposes certain constraints on the Army's Prairie Fire operations in south Laos. Mr. Futterman's position is that while the language of the Military Appropriations Act does not preclude intelligence gathering by Prairie Fire teams, it probably does render illegal any expenditure of funds for "exploitation" activities, i.e., sabotage and deliberate harassment of Communist forces.

2. The Futterman memorandum has been discussed at some length in the Sullivan Committee and referred to the Department of Defense for the views of the Defense Department's General Counsel.

3. Mr. Futterman is a bright young lawyer whose legal skills I am not competent to judge. From working with him on various drafts and versions of the cease fire paper, however, I do know that he has strong dovish propensities and is personally very much opposed to the Vietnam war. Someone better qualified than I, however, will have to determine whether his legal arguments are unduly influenced by this political bias or whether they stand independently on their own merits.

4. I am flagging this matter because it seems to me that if the Futterman argument is bought by State and DOD with respect to US Army operations, a precedent might be set which could cause trouble in the future in Laos or elsewhere.

State Department review completed

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5. No special Agency action seems required at this time and, indeed, I have made a particular point of staying out of the debate between State and Defense on this topic. I am sending a copy of this memorandum to Mr. Houston for his information and also sending copies to General Cushman, Mr. Karamessines and [redacted] Mr. Houston can keep you advised on the progress of the discussions between the lawyers in State and Defense and the extent to which, if any, their debates impinge on our activities.

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[redacted]
Special Assistant for Vietnamese Affairs

Attachment
TS No. 198259

DCI/SAVA

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MEMORANDUM

THE LEGAL ADVISER

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December 22, 1969

TO : EA - Mr. Jonathan Moore

FROM : L/EA - Stanley N. Futterman

SUBJECT: Church Amendment to the Military Appropriations Act

The principal Department of Defense appropriations act for Fiscal 1970, which has now passed both Houses of Congress, contains the following provision:

"In line with the expressed intention of the President of the United States, none of the funds appropriated by this Act shall be used to finance the introduction of armed ground combat troops into Laos or Thailand."

The act appropriates all general purpose funds the Department of Defense will have available until June 30, 1970; other appropriations acts are limited to matters such as military construction and Army Corps of Engineers public works.

The provision originated in the Senate as an amendment proposed by Senator Church on December 15 and adopted the same day. Following Mr. Ziegler's announcement that the Administration had approved the amendment in advance and considered it an endorsement of its policy, it was included in the Conference Report.

In the Senate the amendment was first proposed after the Senate had met in executive session to continue its debate on the Cooper Amendment, which would have limited U.S. "support of local forces in Laos or Thailand" essentially to supplies and training. Senator Church's proposal passed 78 - 17. The majority of the negative votes -- Aiken, Fulbright, Gore, Hart, Kennedy, Mansfield, Mathias, McCarthy, Muskie, Young of Ohio -- appear to have been motivated by their preference for the vaguer but broader Cooper Amendment.

This memorandum will discuss the effect of the Church Amendment on (1) our forces in Thailand; (2) our operations in Laos;

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(3) future action that might be taken pursuant to the SEATO Treaty or Project Taksin; (4) the conduct of exercises. The views given are necessarily tentative. I have not had an opportunity to consult with DOD attorneys. Such consultation is being undertaken simultaneously with the transmission of this memo.

Effect on U.S. Forces in Thailand

what about replacement

The amendment does not limit the use of funds for maintenance of U.S. forces in Thailand, notwithstanding the fact that some of these forces are capable of ground combat. The question was specifically raised in the Senate debate by Senator Tower when the language of the amendment would have referred to "American ground troops". Senator Church responded that "the amendment conforms to the expressed contention of the President", and to clarify the matter inserted the term "combat". He went on to state:

"We are simply not undertaking to make any changes in the status quo. The limiting language is precise and it does not undertake to repeal the past or roll back the present. It looks to the future."
(Congressional Record, December 15, 1969, S16761.)

Present Operations in Laos

1. Air Operations. The amendment has no effect on current U.S. air operations anywhere in Laos. With respect to the Cooper Amendment Senator Fulbright had asked whether it would prohibit U.S. air support for the Laotian Army in north Laos, and Senator Mansfield, one of the sponsors of that amendment had replied that "it is a moot question". However, there was no suggestion by any Senator that the Church Amendment might apply to air operations in Laos and the language of the amendment precludes such an interpretation.

2. Other Operations. See attached TOP SECRET annex.

3. Effect on Future Actions Under SEATO or Project Taksin. The Church Amendment denies to the President the use of appropriated Defense Department funds for introducing ground combat troops into Laos or Thailand. There may be some question in some quarters about whether such action is constitutional. Those concerns aside, were the President to decide that upon

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the introduction of ground troops into combat in Laos or Thailand during Fiscal 1970, he would have to have Congress for legislation that would either eliminate the restriction of the Church Amendment or provide a special appropriation. What restrictions he would be under beyond Fiscal 1970 depend, of course, on what limitations may be written into appropriations acts for future years.

The President would still be free to take such measures as might be necessary solely for the defense of American troops already present in Laos or Thailand. An exchange between Senator Javits and Senator Mansfield on this point was as follows:

Senator Javits: "If our advisory people, who are military representatives, advisers, and so forth, come under attack, should not the record be perfectly clear that U.S. advisory troops are free to defend themselves, that is, they have the right of self-defense but again we should utter caution that that should not represent general authorization to engage in combat operations or to draw us in because U.S. troops have been attacked who are engaged in some advisory role."

Senator Mansfield: "U.S. troops in any country in the world would have every right to protect themselves and I would hope they would." S. 16754

It would be expected, however, that such action would be very short and not involve continuing military engagement.

The legislation thus limits the authority which the President enjoyed in the absence of such legislation. Under his authority as Commander-in-Chief, and particularly in view of the SEATO Treaty, he had the authority to use general purpose funds to take action of an emergency nature to protect a vital interest of the United States, at least until Congress had time to act. An argument can also be made that he had authority to conduct such action without positive congressional action until Congress legislated against it. Now, under the Church Amendment, Congress has taken advance negative action that leaves to the President only powers necessary, so far as the introduction of ground combat troops is concerned, to protect U.S. forces in the area. His power to employ naval

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and air forces to protect other vital interests of the United States remains unimpaired.

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One specific effect of this situation, for example, is that before Project Taksin could be implemented in Fiscal 1970 by the introduction of U.S. ground combat troops, the approval of Congress would be required either by way of special appropriation or legislation repealing the amendment.

4. Exercises. The amendment does not prohibit the use of Defense Department funds to support exercises in the area that may involve the landing of U.S. ground combat troops. The amendment was intended to ensure that specific Congressional action was obtained before American forces were sent into combat in Laos or Thailand. It was not intended to prevent the President from maintaining the viability of that option which to some extent could depend on the conduct of exercises.

However, in view of the attitude manifested by the amendment, it could be expected that any such exercises would provoke doubts in the Congress as to whether the Administration was truly in accord with the spirit of the amendment.

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ANNEX

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2. Other Operations Approved For Release 2002/07/02 : CIA-RDP72-00337R000300010035-7

a) Intelligence. "Prairie Fire" involves small units under Special Forces command, typically consisting of 5-7 American and 25 Vietnamese enter Laos at the rate of some 40 missions per month for operations in the area of the Ho Chi Minh Trail.

In view of the feature of U.S. command, the Americans involved cannot be said to be "advisors" and on that basis excluded from the terms of the Church Amendment.

However, the main purpose of Prairie Fire appears to be that of intelligence/reconnaissance, i.e. the precise identification of targets on the trail against which air power can be brought to bear, and perhaps some monitoring of infiltration. The pursuit of these objectives in this way does not seem to be prohibited by the Church Amendment, and if these operations were to come to light, a sound case could be made that they do not come within the intended purview of the amendment. Reliance could be placed in this connection on the Senate debate.

In a discussion of the broader Cooper Amendment, Senator Mansfield stated in answer to a question that there would continue to be American manpower involved in Laos and Thailand and specifically that "there are the intelligence activities which the distinguished Chairman of the Committee on Foreign Relations referred to, and that is to be understood". (S16754)

b) Self-defense. When these intelligence teams are discovered by the enemy other American personnel must be brought in to achieve evacuation. This too is not prohibited by the Church Amendment. Senator Javits asked with respect to the even broader intent of the Cooper Amendment:

"If our advisory people, who are military representatives, advisers, and so forth, come under attack, should not the record be perfectly clear that U.S. advisory troops are free to defend themselves, that is, they have the right of self-defense but again we should utter caution

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attacked who are engaged in some advisory role."

Senator Mansfield responded:

"U.S. troops in any country in the world would
have every right to protect themselves and I
would hope they would." S16754

The right of self-defense to which the Senators refer reasonably includes calling in other forces that have been standing by solely for the purpose of carrying out any necessary protected evacuation.

c) Exploitation. However, some Prairie Fire operations are intended for "exploitation," that is, to stage an ambush or otherwise carry out a combat function. Such activities are apparently prohibited by the amendment. If these were to come to light some months hence, the reaction from the Congress could be severe.

cc: EA/RA - Mr. Holloway, Capt. Gammon
EA/VN - Mr. Matthews
EA/TB - Mr. Bergeson
EA/LC - Mr. Barnes
H - Mr. Prentice
PM/ISO - Mr. Stoddard
OSD/GC/IA - Mr. Forman

L/EA:SNFutterman:awr 12/22/69

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